Supreme Court, U.S.
FILED
JUL 28 1998
OFFICE OF THE CLERK

No. 97-1962

In The

# Supreme Court of the United States

October Term, 1997

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,

*Petitioner,*

v.

CITY OF MORROW, GEORGIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipal ordinance which allows on-site commercial advertising signs, prohibits on-site non-commercial advertising signs, and prohibits all off-site commercial signs (billboards) violates the First Amendment.

2. Whether a municipal ordinance's ban of all off-site noncommercial advertising signs can withstand a First Amendment challenge by construing the ordinance so that all noncommercial advertising signs are considered on-site signs which are not prohibited by the ordinance.

3. Whether a municipality can satisfy its burden of proving that a ban of off-site commercial signs (billboards) implements and directly advances no further than necessary a substantial governmental interest by adopting legislative findings and a purpose resolution twenty years after the enactment of the ban.

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## I. The Respondent's Ban On Billboards Impermissibly Affects Noncommercial Speech

In its brief in opposition to petitioner's petition for certiorari, the respondent contends that the petitioner's interest in erecting signs in the City of Morrow is only commercial in nature. The respondent states that the case was brought "by a commercial entity seeking to erect billboard structures" intending "to rent space to various commercial entities for advertising." Respondent's brief at 1-2.

The respondent's characterization of petitioner's interest in erecting billboards in the City of Morrow is incorrect. While the petitioner's interest is to profit commercially, it is possible to profit commercially while posting noncommercial messages. For example, candidates for political office spend substantial sums on outdoor advertising in connection with their political campaigns. While the billboard owner may profit commercially by accepting payments from the political candidate in exchange for posting the candidate's message on the company's billboards, the message conveyed is pure political, noncommercial speech.

The respondent contends that the City's ban on billboards will not affect noncommercial speech. The flaw in the respondent's argument that noncommercial speech is not impacted is underscored by the respondent's admission that one of the reasons for denial of petitioner's request for approval of its sign permits "was a city-wide prohibition of off-site commercial advertising and billboards." Respondent's brief at 3. The record shows that the applications submitted to the respondent's permits

and licenses clerk requesting her approval of the construction of four billboards did not indicate whether the message to be placed on the proposed billboards would be commercial or noncommercial. The applications sought permission to build sign structures and made no mention of the messages to be placed on them. As a result, the clerk had no way of knowing whether the proposed signs would bear commercial or noncommercial messages and yet the applications were denied.

Contrary to the respondent's argument that permits are always issued for noncommercial advertising signs, permits were denied the petitioner even though no representation was made that the messages to be placed on the proposed signs would be commercial. The conclusion to be drawn from the actions of the City in response to petitioner's applications is that by banning billboards the challenged ordinance in fact bans both commercial and noncommercial signs, whether they be deemed on-site or off-site. Because it is clear that on-site commercial signs are permitted, the result is that the ordinance – both as written and as applied – favors commercial over noncommercial speech in violation of the First Amendment.

## II. Respondent's Scheme Of Prohibiting Commercial Off-Site Signs While Allowing Noncommercial Off-Site Signs Is An Insufficient Fit Between The City's Means And Ends

The Court of Appeals upheld the City of Morrow's prohibition on billboards by concluding that "all

noncommercial speech is on-site."[1] (App., *infra*, at p. 12a). It also found that the City's interest in restricting signs is based on concerns of aesthetics and traffic safety. (App., *infra*, at pp. 5a-6a). Thus, the court concluded that the City may allow noncommercial signs throughout the City while prohibiting off-premise commercial signs city-wide to further the City's interest in aesthetics and traffic safety. This decision squarely conflicts with this Court's ruling in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

Just as there was an insufficient fit in *Discovery Network* between Cincinnati's means and ends in prohibiting commercial newsracks while allowing noncommercial newsracks, because Cincinnati's approach would leave in place a large percentage of the city's many newsracks, *id.* at 417, 113 S.Ct. at 1510, there exists in this case an insufficient fit between the City of Morrow's means and ends because its approach leaves in place a large percentage of signs which the City has deemed to be unsafe and aesthetically displeasing. The following discussion from *Discovery Network* is instructive:

> The Chief Justice is correct that seven Justices in the [*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)] case

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[1] The Court of Appeals' self-described "alternative view" of noncommercial signs has been described as "somewhat tortured." One commentator believes it doubtful that government officials attempting to distill guidelines from the decision will reach constitutionally consistent results. Elizabeth C. Pennewill, *Recent Developments*, 27 Stetson Law Review 1018, 1023 (1998).

> were of the view that San Diego could completely ban off-site commercial billboards for reasons unrelated to the content of those billboards. *Post*, at 1524-1525. Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial off-site billboards that cause the same esthetic and safety concerns. That question was not presented in *Metromedia*, for the regulation at issue in that case did not draw a distinction between commercial and noncommercial off-site billboards; with a few exceptions, it essentially banned *all* off-site billboards.

507 U.S. at 425 n.20, 113 S.Ct. at 1514 n.20.

The question not presented in *Metromedia* is presented here: may the City of Morrow distinguish between commercial and noncommercial off-site billboards that cause the same aesthetic and safety concerns? The Court of Appeals concluded that the City may distinguish between commercial and noncommercial off-site billboards causing the same aesthetic and safety concerns by banning off-site commercial billboards and allowing off-site noncommercial billboards. The court's decision is contrary to the analysis employed by this Court in *Discovery Network* in reviewing Cincinnati's ban on commercial newsracks.

## III. Lower Appellate Courts Have Divided In Their Application Of *Metromedia v. City Of San Diego*

Notwithstanding the diverse and often directly conflicting decisions of lower courts applying this Court's plurality opinion in *Metromedia v. City of San Diego*, 453

U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the respondent contends that certiorari should be denied because the plurality decision in *Metromedia* has been applied uniformly. The respondent's argument contrasts sharply with the Court of Appeals' decision in the instant case, where the court expressly acknowledged that the Fourth and Ninth Circuits have invalidated ordinances almost identical to the City of Morrow's, while the Tenth Circuit has upheld a similar ordinance. (App., *infra*, pp. 10a-11a n.8). The respondent seeks to convince this Court that *Metromedia* has been routinely applied with each case turning on its own facts. Respondent's brief at 14. It must be noted, however, that of the twenty cases identified in petitioner's brief (brief of petitioner at 12-13 n.2) which have divided in their application of *Metromedia*, the respondent only contends that two of the holdings are consistent with *Metromedia* and "turn on their own facts." While the respondent seeks to distinguish its ordinance from those considered in *Jackson v. City Council of Charlottesville*, 659 F. Supp. 470 (W.D.Va. 1987), *aff'd in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988), and *Ackerley Communications, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), it has ignored the holdings of the other nine cases set forth under "Distinction Held Unconstitutional" on page 12 of petitioner's brief, and all of the cases described under "Distinction Held Constitutional."

To underscore the fact that a split exists among appellate courts seeking to apply this Court's plurality decision in *Metromedia*, one may focus not only on the contrary decisions expressly cited by the Court of Appeals in the instant case, but also the decision of the Supreme Court of Georgia in *Union City Board of Zoning*

*Appeals v. Justice Outdoor Displays*, 266 Ga. 393, 467 S.E.2d 875 (1996). In that case the Supreme Court of Georgia, seeking to apply *Metromedia*, adopted the reasoning of the First Circuit in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), and expressly rejected the holding of the Eleventh Circuit in *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993). Contrary to the holding in *Messer* that an ordinance allowing on-premise signs while banning off-premise signs within a particular district of the city "regulates signs not based on the viewpoint of the speaker, but based on the location of the signs," 975 F.2d at 1509, the Supreme Court of Georgia held that *Messer* would permit the very result proscribed in *Metromedia*: "with respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Justice Outdoor Displays*, 266 Ga. at 397, 467 S.E.2d at 880, quoting *Metromedia*, 453 U.S. at 515, 101 S.Ct. at 2896.

The split among appellate courts attempting to apply *Metromedia* is graphically underscored by the disagreement in its application by the Eleventh Circuit Court of Appeals and the Supreme Court of Georgia. While these courts are separated by only five city blocks geographically, their applications of this Court's holding in *Metromedia* are miles apart theoretically. As a result, the state of the law in Georgia, and in other states[2] depends on

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[2] *Compare Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917 (Va. 1988) with *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), *cert. denied*, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994); and *compare Norton Outdoor*

whether a challenge to sign regulations such as those adopted by the City of Morrow is decided in state or federal court.

The petitioner respectfully requests that the Court grant its petition for certiorari to provide answers to the questions here presented so that the rules applicable to local governments and billboard companies will be the same throughout the land.

Respectfully submitted,

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*Advertising, Inc. v. Village of Arlington Heights*, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982), with *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988).